SUPREME COURT, U.S.
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No. 99-215

In The

Supreme Court of the United States

DIANA CASEY, et al.,

Petitioners,

v.

RETIREMENT BOARD OF THE RHODE ISLAND EMPLOYEES' RETIREMENT SYSTEM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Circuit properly decided Petitioners' Contract Clause challenge to their eviction from the Employees' Retirement System of the State of Rhode Island, on a claim grounded not on years of public service, but based only on private union employment.

PARTIES

Paul J. Tavares succeeded Nancy J. Mayer as General Treasurer of the State of Rhode Island and Chairperson of the Retirement Board on January 5, 1999. Treasurer Tavares is automatically substituted as a party pursuant to Supreme Court Rule 35(3).

The National Education Association of Rhode Island ("NEA-RI"), Richard DeOrsey, Janice Lanik Quinn, and Vincent Santiniello were parties below, but are not Petitioners here.

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STATEMENT OF THE CASE

Petitioners seek review of the First Circuit's opinion in *National Education Association-RI, et al. v. Retirement Board, et al.*, 172 F.3d 22 (1st Cir. 1999) ("*NEA*"), a unique case that affects only their distinct interest in the Employees' Retirement System of the State of Rhode Island. ("Retirement System" or "ERS"). 172 F.3d at 25; Petitioners' Appendix at 7a.[1] This case begins in the 1980's with the quest for the passage of what became R.I. Gen. Laws § 36-9-33 (repealed 1988) (the "Union Pension Act)." 172 F.3d at 24; Pet. App. 2a-3a. Over two years, several Petitioners lobbied the General Assembly of Rhode Island ("General Assembly") for passage of this bill, but it died in committee.[2]

By 1987 the winds of political fortune had changed. Respondent DiOrio changed jobs, moving from NEA-RI to the State House to become Governor Edward DiPrete's Chief of Policy (and legislation). Respondent Press testified in favor of allowing DiOrio to purchase his prior union time toward a State pension. This time the bill was

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[1] References to Petitioners' Appendix are hereinafter designated "Pet. App."

[2] Petitioner **Edward McElroy**, then president of the Rhode Island Federation of Teachers ("RIFT") sought introduction of a union pension bill. Deposition of **McElroy** at 3-4, 28; Petitioner **Ronald DiOrio**, former president of NEA-RI, had discussed the concept and soon became aware of the legislation. Deposition of **DiOrio** at 33-41; *see* also **McElroy** Depo. at 28; **McElroy** met with Speaker **Matthew Smith** of the General Assembly's House of Representatives about introducing such legislation. **McElroy** Depo. at 29-30. In 1986 Petitioner **Robert Casey** from RIFT, and Petitioner **Harvey Press** from NEA-RI lobbied for the bill.

guaranteed success by being placed on the Consent Calendar when considered by both the House and Senate.[3] 172 F.3d at 24; Pet. App. 3a. With virtually no debate, the Union Pension Act "snuck" through on the last day of the 1987 legislative session.[4] 172 F.3d at 24; Pet. App. 3a. The Union Pension Act became law without the Governor's signature as 1987 R.I. Pub. L. ch. 613 and was codified at R.I. Gen. Laws § 36-9-33.

A political firestorm developed when the provisions of the Union Pension Act became known. During the next session of the General Assembly, the Union Pension Act was repealed by 1988 R.I. Pub. L. ch. 486. Petitioners were subsequently denied access to the ERS, and brought a State court action to determine the prospective nature of the repeal. 172 F.3d at 25. The union members were not permitted into the ERS until April of 1990, retroactive to

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[3] A bill can only be placed on the Consent Calendar with the approval of leadership of both parties in the House and the Senate.

[4] *See* the following remarks from the General Assembly's Hearing Re: Bill #94-H-9040: Remarks of **Rep. Lynch** at 28; "This was put on the consent calendar. We did not know who the names were. It was snuck right through"; Remarks of **Rep. Teitz** at 30; "I believe a serious mistake was made in 1987 when the original legislation allowing these individuals to purchase time in the pension system was passed. It was passed without adequate scrutiny or explanation."; Remarks of **Rep. Long** at 33; "[The passage of the Union Pension Act] was, in my opinion, a conspiracy of the highest nature in this building committed by members of the Legislative and Executive branch of Government by Democrats and Republicans; and the leaders in this building thought they slipped one by the people of the State of Rhode Island."; Remarks of **Rep. Carulo** at 40; "This [passage of the Union Pension Act] was done behind everyone's back."

January of 1990, by order of the State court. The ultimate effect of the Union Pension Act was to allow these private union officials to qualify almost immediately for State pensions – strikingly greater than their contributions – while never having worked a day of that time for the State. 172 F.3d at 24; Pet. App. 4a. The District Court calculated Petitioners' total contributions to the Retirement System for private union time at $1,995,748, with a then present value of projected pensions at $11,430,579, and an average rate of return of approximately 1250%. *Id.*

The First Circuit found that the ERS is a "defined benefit plan." 172 F.3d at 24; Pet. App. 2a. In such a plan, benefits are calculated not on the amount contributed, but on a schedule based on years of service. R.I. Gen. Laws § 36-10-10. 172 F.3d at 24; Pet. App. 2a. State employees may retire and begin receiving payments at any age after 28 years of service, or after reaching the age of 60 with 10 years of service. R.I. Gen. Laws § 36-10-9. 172 F.3d at 24; Pet. App. 2a. A pension benefit is determined by taking the average of the three highest consecutive years of earnings multiplied by the years of credited service. R.I. Gen. Laws § 36-10-10. 172 F.3d at 24; Pet. App. at 2a. The Union Pension Act allowed Petitioners to increase their private union salaries, thus boosting their public pensions without State control. 172 F.3d at 24 n.2; Pet. App. at 3-4a n.2. The net result was an incredible windfall due to Petitioners' manipulation of the Retirement System.[5]

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[5] Petitioner **Bernard Singleton** purchased 25 years of union time at a cost of $25,411 after serving only eighteen months as a State employee. He retired in July of 1990 with a pension of

Ultimately, the General Assembly passed the Eviction Act to correct the errant policy that had slithered through. *See* 1994 R.I. Pub. L. ch. 413, § 1, codified at R.I. Gen. Laws § 36-9.1-1 et seq. The Eviction Act only removes Petitioners' union time from the ERS. *Id.*

Indeed, *NEA* recognized the "eccentric facts" of this case. 172 F.3d at 26; Pet. App. 7a. The First Circuit considered Petitioners' Contract Clause challenge and reviewed Rhode Island's pension laws. The appellate court found no language of contract in the statute. 172 F.3d at 28; Pet.

$53,000 per year, and an estimated lifetime benefit of $750,000. Petitioner **Bernard F. Connerton** contributed $27,072, retiring in July of 1990 at age 53 with an estimated benefit of almost $640,000. Petitioner **Gloria Heisler** retired after 20 years of teaching in July of 1990. Based on the Union Pension Act she purchased almost 15 years of union time that ended in 1965 for $2,241 to receive an increase of $15,160 per year to her teachers pension. **Heisler's** estimated lifetime gain was $222,202 for an unimaginable lifetime return of 9911%. Petitioner **McElroy** contributed $34,385 to retire in November of 1992 at the age of 51 with an estimated lifetime benefit of approximately $550,000. Petitioner **Edward Casey** contributed $28,351 and then retired in December of 1992 at age 56 with an estimated lifetime return of more than $650,000. Petitioner **Joseph Grande** retired in 1993 after purchasing 22 years of credit for $33,827 for an estimated lifetime return of $628,850. *See* Affidavit of Arthur Anderson 9/13/94; Affidavit of James Reilly 9/12/94; and 172 F.3d at 25 n.3; Pet. App. at 4-5a n.3. Petitioner **DiOrio** stipulated to the fact that he was not eligible to retire prior to the Eviction Act. Nonetheless, at age 50 he managed to receive pension benefits based on a contribution of $23,542 beginning in July of 1990 until July of 1994 totaling $162,835.85. **DiOrio** was indicted for obtaining money under false pretenses based on his entry and receipt of ERS benefits. On July 23, 1999 he was found not guilty after a bench trial.

App. at 10-11a. The court did not "think that references in the statute to 'vesting' create[d] a contract." 172 F.3d at 28; Pet. App. 11a. The court differentiated between the question of vesting, "the period an employee must work to become eligible for a pension," and "whether a plan offers contractual protection against a change in its terms as a different question." *Id.* The First Circuit did "not think that the Rhode Island general pension statute 'clearly and unequivocally' contracts for future benefits either by language or – *in the circumstances of this case – through the nature of the relationship.*"[6] 172 F.3d at 28-29; Pet. App. 10a-13a. (emphasis added)

Judge Boudin, writing for a unanimous court, then turned to the circumstances of this case and found:

> The existence of an employee-employer relationship does weigh in favor of finding an implied contract, as the non-governmental pension cases made clear. *See McGrath*, 88 F.3d at 17 (summarizing case law). However, the force of this consideration is very much muted in this case: these particular Petitioners do not have the benefit of a clear and longstanding employer-employee relationship with the government – they are far from the quintessential ten (10) or twenty-eight (28) years-of-service government employees.

172 F.3d at 28-29, Pet. App. 12a.

The First Circuit explicitly "decline[d] to decide now whether this last consideration [the existence of an

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[6] Petitioners' fail to acknowledge their unique circumstance, the "lack of employer-employee relationship" with the State, as the basis for the First Circuit's Contract Clause decision. Petition at 8 and 9.

employee-employer relationship] would tip the balance if, for example, Rhode Island took a meat ax to the pensions of long-time State employees." 172 F.3d at 29; Pet. App. 12a. Since the Rhode Island pension statute does not "clearly and unequivocally" create a contract by its expressed language, the appellate court "happily deferred" the "conundrum of a 'statutory' contract that may meet this requirement by clear implication rather than clear language." 172 F.3d at 29; Pet. App. 13a. The court reasoned that:

> Here, the class of persons who have been "evicted" are individuals who were never public employees – at least in the capacity for which the State pensions are sought – and were permitted to enter the system at bargain-basement prices while retaining their pensions as union employees. The discrepancy between what they contributed as a class and what they might expect in pensions was striking. And almost at once, they were warned of legislative efforts to undue their unusual benefits. The first such attempt (the Repeal Act) was frustrated in state court, but the Eviction Act followed hard on its heels.

172 F.3d at 31; Pet. App. at 17a.

NEA held that prospective pension payments were not required under the Contract Clause – "at least as to these 'last minute entrants.' " 172 F.3d at 30; Pet. App. 15a. The First Circuit specifically limited its holding to these particular Petitioners, deferring to the General Assembly the determination of what rights public employees may have in their Retirement System. 172 F.3d at 30; Pet. App. at 17a-18a. Respondents submit that the

facts relevant to this Petition are found in the *NEA* decision of the First Circuit, and request that this Court reject Petitioners' additional factual conclusions unsupported by the record.

SUMMARY OF ARGUMENT

There is no reason for this Court to grant Petitioners' application for Writ of Certiorari. This Petition only involves the remaining 13 persons, and one union, who were found to be properly evicted from one state's retirement system. Indeed the "eccentric" facts of this pension case are due to the Petitioners' unusual circumstances. Petitioners seek public pensions for private union employment that began, and in some instances ended, long before the passage of the Union Pension Act. Instead of engaging the sweeping arguments made by Petitioners, the First Circuit appropriately left to the General Assembly of Rhode Island the question of what rights State employees have in their Retirement System. What rights public employees may have in their various retirement systems, including Rhode Island's public employees, is not at issue here. Thus further review will not impact anyone, save those Petitioners that approach this Court. Finally, the First Circuit correctly applied the well-settled Contract Clause analysis to Petitioners' claim and found that they were constitutionally evicted from the Employees' Retirement System of the State of Rhode Island.

ARGUMENT

I. There Is No Compelling Reason To Grant Certiorari.

Rule 10 of the Supreme Court Rules provides that a writ of certiorari will be granted *only* for compelling reasons. A petition is rarely granted when the asserted error consists of erroneous factual findings, as is the case here. There is no compelling reason to grant review. This case only concerns the pension trust fund created for Rhode Island's public employees. Petitioners continue to masquerade themselves as public employees, attempting to obtain what they did not earn, public pensions for time spent as private union employees. Petitioners were never public employees for the private union time evicted from the Retirement System. 712 F.3d at 31; Pet. App. at 17a-18a. The Union Pension Act, which allowed Petitioners into the ERS, was subsequently repealed.

This Court has considered why certiorari was inappropriate in a case unlikely to occur again in *Rice v. Sioux City Memorial Park Cemetery*, 348 U.S. 880, *cert. dismissed as improvidently granted*, 349 U.S. 70 (1955) ("*Rice*"). In *Rice* a statute was amended that barred the claim from arising again, as in the instant case. In dismissing the writ, Justice Frankfurter wrote:

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues

> involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. (citations omitted).

349 U.S. at 74.

The Court reasoned:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the . . . Courts . . . (citations omitted).

349 U.S. at 79.

Thus given the unique factual perspective, this case stands alone from every other public pension case. More importantly, this case only involves Petitioners, not the rights of the 19,000 retired or the 34,000 active public employee members of our Retirement System.

Petitioners overlook their distinct "circumstances" and the limited reach of the *NEA* decision below to ask this Court for a ruling that would affect over "2000 governmental retirement system, with more than ten million members." (Petition at 10). Petitioners' request, in a Contract Clause claim as to one state's pension plan, is inconsistent with the requisite inquiry of such a challenge – to review "the specific terms of the statute supposed to create such a contract." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104 (1938). Further, Petitioners ask this Court

to entertain the very issue which the First Circuit "happily deferred;" *i.e.*, whether and under what circumstances the ERS establishes a contractual relationship with its long-term public servants. (Petition at 10-11). The First Circuit exercised appropriate judicial restraint and declined to engage in needless speculation.

Moreover, Petitioners' contention that *NEA* is somehow inconsistent with other First Circuit decisions is misplaced. The First Circuit reviewed the holding in *McGrath v. Rhode Island Retirement Board*, 88 F.3d 12 (1st Cir. 1996), stating: "The theory is that the plan is an offer and the employee, by working for many years pursuant to the plan, has relied on and accepted the offer, which cannot now be changed unilaterally as to a vested employee, whether still working or retired." 172 F.3d at 27 (*citing McGrath* at 17); Pet. App. 8a. To support this general proposition, *McGrath* recognized that "the promise of a pension constitutes an offer which, upon performance of the *required service* by the employee[,] becomes a 'binding obligation.' " 88 F.3d at 17 (*quoting Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 4-5 (1st Cir. 1978) (emphasis added)). *McGrath* was also mindful of the special employment environment for public employees due to the "very nature of a republican form of government." 88 F.3d at 20. The unilateral public pension contract in *McGrath*, however, was based on public service rendered. Even in *Hoefel*, a private sector pension case, Plaintiffs were retired Atlas employees. Here, Petitioners' claim in our public pension system is for private union employment. Without public service, they have no contract, unilateral or otherwise, based upon the Union Pension Act.

NEA found that an implied-in-fact unilateral contract was not created, since Petitioners "did not have the benefit of a clear and longstanding employee-employer relationship" with the government for the payment of future benefits. 172 F.3d at 28-29; Pet. App. 12a. The First Circuit held that future benefits were not contractually obligated "to these 'last-minute' entrants." 172 F.3d at 30; Pet. App. 15a. *NEA's* holding is based on a firm understanding of Rhode Island's defined benefit plan. The cornerstone of our Retirement System is the premise that the receipt of a pension can only be based on long-term public service. Indeed, the ERS funds itself through long-term employment, with contributions that are invested over time, to culminate in pensions for generations of members.

Furthermore, the Union Pension Act did not, by express language or implication, include the union employees in the Retirement System under a contract of employment. State employees, however, are members of the ERS "under contract of their employment" with the State. R.I. Gen. Laws § 36-9-2. Likewise, the statutory definition of an employee in the ERS is an "employee of the State of Rhode Island." R.I. Gen. Laws § 36-8-1(8). That definition never included union employees. Thus, the Union Pension Act never specifically equated union time with service to the State.

In a more recent decision, the First Circuit determined that former Rhode Island legislators or their spouses could not establish a sufficient employee-employer relationship to prevail on a Contract Clause challenge for retirement benefits. *Parella v. Retirement Board of Rhode Island Employees Retirement System*, 173 F.3d 46 (1st Cir. 1999). Among other reasons, *Parella* found that

the pension seekers did not "stand in the classic employer-employee relationship with the State." 173 F.3d at 61. Again, the court reviewed the Rhode Island pension statute and stated that "[p]articipating Plaintiffs bringing particular Contract Clause claims based upon the Rhode Island pension statute may find themselves in markedly different circumstances." *Id.* The First Circuit found that the statute did not create a binding contractual obligation for the legislators, and also created federal tax code problems for the Retirement System, similar to *NEA*. 173 F.3d at 62. *Parella* concluded that the Plaintiffs there "had none of the indicia of a true pension" and denied their claim. *Id.*

Despite Petitioner's insistence, the circumstances of their Contract Clause challenge are factually and analytically distinct from the public employee members of the Retirement System. (Petition p. 12). *See Parella* 173 F.3d at 61 (noting plaintiffs in *NEA* and *Parella* do not resemble "hypothetical" claim of long-term state employee). Thus, there is no conflict between First Circuit opinions. Accordingly, there is no compelling reason for this Court to accept this case for review, and this Petition should be denied.

II. Petitioners' Request To Review This Court's Decision In *Pennie v. Reis* Has No Application To The Case At Bar.

Petitioners request that this Court review *Pennie v. Reis*, 132 U.S. 464 (1889), a case involving a Due Process

challenge,[7] and the "gratuity model" of a pension plan, to determine if it has any "continuing validity." (Petition at 14). The First Circuit did not consider *Pennie* in deciding Petitioners' Contract Clause challenge. Indeed, Petitioners' can only assert that the First Circuit "presumably" took this approach. (Petition at 15). They are mistaken. This request is no more than an "academic" exercise that is of no consequence to the present matter. *See Rice, supra.*

NEA properly considered the basis for a Retirement System pension, reviewing Rhode Island's pension statutes and case law, in particular, *Matter of Almeida*, 611 A.2d 1375 (R.I. 1992).[8] There, the Supreme Court of Rhode Island declined to categorize a noncontributory public pension as a gratuity. 611 A.2d at 1385. In *Almeida*, the court determined "that a public pension comprises elements of both the deferred compensation and contract theories," reasoning:

> The right to deferred compensation vests upon meeting the terms of employment, but the vesting is subject to divestment because it is conditioned on continued honorable and faithful service. We need not distinguish between the contributory and the non-contributory natures of a public pension because vesting is continually subject to the implied conditions of good

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[7] Petitioners did not pursue their Due Process claim on appeal to the First Circuit, or here. (Petitioner at 9 n.9).

[8] *Almeida* concerns the Committee on Judicial Tenure and Discipline's recommendation to revoke former Superior Court Associate Justice Antonio Almeida's pension after he was found to have taken bribes. *Id.* at 1378-79.

> behavior and honorable service in all areas of public service. These prerequisites must be satisfied to receive a pension and are quintessential for one employed in public service, especially as a judge. Vesting of the amount to be paid by the state in pension as deferred compensation is therefore subject to suspension, in a manner similar to the requirements for receiving compensation.

611 A.2d at 1386.

Almeida found honorable and faithful service is "a necessary condition precedent" for receipt of a public pension. 611 A.2d at 1387. Rhode Island's high court "declined to expressly categorize" the right to a state pension "once the employment contract is signed." 611 A.2d at 1385-86. Likewise, *McGrath* recognized the significant disagreement as to when contractually enforceable rights accrue in state and municipal pension plans. 88 F.3d at 17. Because Petitioners cannot establish a long-term employer-employee relationship culminating in a pension, they are forced to argue for a contract at the beginning of the employment relationship. *Almeida* does not support this contention. Moreover, Petitioners cannot fulfill the condition precedent of public service. They never had that relationship.

Petitioners argue further that there is a conflict among lower federal and state courts, and that a "great diversity" exists as to when contractual rights accrue in the various state retirement systems. (Petition at 15-18). This "diversity" can be attributed to the different statutes that created these systems and the legislative intent behind them. Petitioners, to "some extent," concede that

point. (Petition at 18). In any event, the teachings of a recent First Circuit decision are equally applicable here. *See Parker v. Waklin*, 123 F.3d 1 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1675 (1998). *Parker* involved a Contract Clause challenge by Maine public school teachers who, although not retired, incurred a reduction in benefits payable upon retirement. The First Circuit concluded that a "blanket answer to the issue of Contract Clause protection for vested employees is not possible, because, . . . a detailed examination of the particular provisions of a state pension program will be required prior to determining the nature and scope of the unmistakable contractual rights, if any, that are created by a given state legislature." 123 F.3d at 4. Applying the teachings of *U.S. v. Winstar*, 518 U.S. 839 (1996) and *McGrath*, the court:

> Eschewed participating in abstract contract theory in favor of performing a close analysis of the statutory provision at issue. Such an approach is wise, because the unmistakability doctrine mandates that we determine whether the challenged legislative enactment evinces the clear intent of the state to be bound to particular contractual obligations.

123 F.3d at 7.

Only Rhode Island's pension system is involved in this case. A pronouncement by this Court in a Contract Clause case cannot prevent a state from determining when rights accrue within its own pension plan. Petitioners' request for guidance from this Court, in view of the disparate nature of the "2,000 state and local government retirement systems in existence, with more than ten

million members," is wholly without merit. (Petition at 10).

III. The First Circuit Properly Considered And Denied Petitioners' Contract Clause Challenge To The Eviction Act.

Petitioners concede, as they must, that *NEA* correctly identified the "applicable [Contract Clause] standard." (Petition at 19). The First Circuit considered the following passage from *National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co.*, 470 U.S. 451, 465-66 (1985) ("*National Railroad*"):

> For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.

470 U.S. at 465-66 (internal citations omitted).

Additionally, "the party asserting the creation of a contract must overcome this well-founded presumption. . . . " *Id.* at 466 (*citing Dodge v. Board of Education*, 302

U.S. 74, 79 (1937)) ("*Dodge*"). To determine whether such a contract exists, "the cardinal inquiry is as to the terms of the statute supposed to create such a contract." 470 U.S. at 466 (*citing Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104 (1938)) ("Brand"). This Court has stated that, "[i]n general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust of New York v. New Jersey*, 431 U.S. 1, 17 n.14 (comparing *Dodge* and *Brand, supra*). *See also Hoffman v. City of Warwick*, 909 F.2d 608, 614 (1st Cir. 1990) (Statute providing enhanced seniority in employment for veterans did not contractually bind state or municipalities, thus repeal did not violate Contract Clause.). Even further, the "unmistakability doctrine" requires that the legislative intent to create a contract must be, in a word, unmistakable. *U.S. v. Winstar*, 518 U.S. 839, 871-72 (1996).

As discussed above, *NEA* properly determined that the Union Pension Act did not establish a contract between the Retirement System and the Petitioners. Clearly, this controversy does not involve a statutory contractual offer. The language of the Union Pension Act is too indefinite to create a contract. Moreover, the Union Pension Act does not contain the words "contract," "consideration," "reliance," or "acceptance," nor does it express terms of mutual obligations, duties and rights.

The absence of contract language demonstrates that the Union Pension Act is a declaration of policy, subject to modification by a succeeding session of the General Assembly. *See Winstar*, 518 U.S. at 872 (discussing *Blackstone's Commentaries*, stating "the centuries old concept

that one legislature may not bind the legislative authority of its successors"); *National Railroad, supra; Retired Adjunct Professors v. Almond*, 690 A.2d 1342 (R.I. 1997). Thus the Union Pension Act did not create a contract by its express language, or by implication. Accordingly, the absence of a contract defeats Petitioners' Contract Clause claim.

In *Retired Adjunct Professors* the Supreme Court of Rhode Island considered a Contract Clause challenge by retired educators to a statutory amendment that suspended pension benefits upon acceptance of State reemployment. The court held the statute did not create any right cognizable under the Contract Clause of either the Federal or State Constitutions.

Retired Adjunct Professors reasoned that "[i]n the determination of whether public-contract rights exist, the most important fact is legislative intent as it is expressed in the language of the statute." 690 A.2d at 1346 (citing *National Railroad*, 470 U.S. at 466 and *Brennan v. Kirby*, 529 A.2d 633, 639 (R.I. 1987)). The court stated that "there is a strong presumption against construing a statute to create such contractual obligations, and individuals alleging its creation bear the heavy burden of overcoming this presumption." 690 A.2d at 1345. Rhode Island's high court also recognized it must avoid " 'play[ing] havoc with basic principles of contract law, traditional contract clause analysis, and most importantly, the fundamental legislative prerogative to reserve to itself the implicit power of statutory amendment and modification.' " 690 A.2d at 1346 (*quoting Pineman v. Oechslin*, 195 Conn. 405,___, 488 A.2d 803, 808 (1985)).

As to issues of reliance and estoppel, *Retired Adjunct Professors* held that even though plaintiffs may have relied on the then-existing statute:

> They were not entitled to conclude that these provisions were fossilized in legislative amber. . . . Mere reliance by benefited parties on legislative enactments and their unilateral beliefs concerning what the statute will mean to them in the future, no matter how reasonable they may seem at the time, cannot create a legislative intent to establish enforceable contractual rights that is not otherwise manifest in the words of the legislation. . . . In applying this concept, courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis of a contract or an estoppel. . . . Thus notions of promissory estoppel that are routinely applied in private contractual contexts are ill-suited to public-contract rights analysis.

690 A.2d 1345-46 (*quoting Pineman v. Fallon*, 662 F. Supp. 1311, 1316 (D. Conn. 1987), *aff'd*, 842 F.2d 598 (2d Cir.), *cert. denied*, 488 U.S. 824 (1988)).

Turning to Petitioners' "circumstances," they are unlike the public servants in any other public pension case. These private union employees do not have the underlying employer-employee relationship of public service – the foundation of a claim to a public pension. The First Circuit in *Parella* made the circumstance of the *NEA* case clear, stating:

> In NEA, we contrasted the Plaintiffs' claim with a hypothetical claim brought by a quintessential 10 or 28 year of service government employee

> whose pension benefits had been radically reduced. Without deciding the question, we noted that such circumstances presented a very different Contract Clause claim. 173 F.3d at 61.

The First Circuit's determination concerning the specific circumstances of these particular Petitioners was correct, and should be allowed to stand.

Finally, not one of these Petitioners can legitimately claim any inducement for employment from "the promise of a pension [as] part of the compensation package" that was "dangle[d] to attract and retain qualified employees." *McGrath*, 88 F.3d at 16-17. (Petition at 20). Every one of them was already employed when they were finally allowed into the ERS in April of 1990. Of the seven Petitioners who received pension benefits, four received retirement benefits almost immediately. The only attraction for the retired Petitioners was a windfall they never could have legitimately anticipated when their employment began. As to the other Petitioners, they were in the Retirement System under the Union Pension Act for only four years. The argument that these benefits were "dangled to attract and retain" these Petitioners is not only misplaced, it is disingenuous. (Petition at 20). The question presented by Petitioners is an affront to every hardworking public employee, who contributes on a daily basis through public service and contributions to the Employees' Retirement System, and to the people of the State of Rhode Island.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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